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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

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Appellant: Gorkam I. Ates

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Washington, D.C. 20231

Date: Feb. 10, 2003

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BRIEF ON APPEAL

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Sir:

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Appellant appeals from the final rejection of pending claims 1-6 and

20

files the instant Brief on Appeal in triplicate. Accordingly attached

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herewith please find Agent's Check No.: 7078 drawn on CHEMICAL BANK in the

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amount of \$160.00 to cover the required fee for submission of applicant's

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brief on appeal for a small entity.

24

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RESPECTFULLY SUBMITTED

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INTRODUCTION

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Common law is a source of law that represents a pillar upon which our legal system rests. Common law began in 12th century England as unwritten law, reflecting "common" customs.

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By the 17th century, common law began being written down from judges, deciding actual cases, based on decisions of the past, and came to be dubbed "decisional law" or "case law." Common law looks to the past, evolving new rules by adapting old ones.

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Describing where common law came from, Oliver Wendell Holmes, Jr. wrote:

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"A very common phenomenon, and one very familiar to the student of history, is this. The customs, beliefs, or needs of a primitive time establish a rule or a formula. In the course of centuries the custom, belief, or necessity disappears, but the rule remains."

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Common law are rules of law, organically grown, as if following Darwin's principle of natural selection. Useful laws are used again and become part of the common law, to serve as the foundation for further refinements, and useless laws are forgotten.

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Common law is judge-made law. Each time a case is decided, it is added to the folk law that is the common law. The important decisions are relied upon and serve as precedents that are used to decide future cases.

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A disadvantage of the concept of precedent, however, is that the law is slow to change with changing times, but when it does, it is well received.

1 Precedent is the soul of common law. It exists as folk law, passed
2 on from written decision to written decision, much as our tribal ancestors
3 passed on knowledge by word of mouth. It is this decisional law that
4 appellant relies upon in support of his arguments presented, *infra*, in the
5 instant Brief On Appeal.

1 PRELUDE

2 The present invention is a system and method for allowing TCP/IP
3 servers to assign jobs to other servers dynamically without relocating the
4 client using neither HTTP nor HTML commands, wherein the "main server" is
5 the server of the ISP (the main TCP/IP server), the "participants" are the
6 servers that are assigned jobs, and the "client" is the client computer
7 that makes the actual request. The system and method of the present
8 invention depend upon the publicly known technique of "IP Spoofing" and
9 take the relocating process away from the top networking OSI layers, such
10 as TCP, HTTP and application level to the 3rd level of internetworking OSI
11 that is the IP. It enables Internet-wide load balancing and content
12 delivery with only a single IP involved as the listener.

13 In practice, the client requests a file or document from the main
14 server (a streaming video and/or audio file is typical).

15 The main server operates at the firewall/IP level and has an IP
16 stack (separate from the TCP/IP stack of the operating system) that can
17 forward packets to another host with a TCP/IP connection and a basic
18 database running that stores and retrieves the data of IP addresses and
19 the ports of the participant servers and the socket information (IP, port,
20 latest sequence number of the packet exchange as well as the TCP state) of
21 the client. The main server examines the client's IP address and seeks
22 the nearest participant server (the one that has the most bandwidth and
23 CPU, geographically closest, and other serving requirements needed to
24 serve a document to the client).

25 The main server, acting like an orchestra chief, requests the
26 participant to send the document client requested to the client packet-by-
27 packet, labeling each packet with the senders IP address being the main
28 servers IP address. This enables the client, which has a port open only
29 for a main server's address to accept the packets (the file). To

1 accomplish this goal, the main server examines the IP address port of the
2 packet. Then takes action as:

- 3 1. if the port of the specific client's socket does not have a
4 correspondence in the database (determined after a "SELECT" SQL
5 statement), which means that the client has just started a
6 connection with a SYN packet. Then this client socket is stored in
7 the database with four variables: IP address, port number, and TCP
8 state along with a timestamp for the socket; and
- 9 2. if the IP and port are present in the database as an active
10 connection (a connection that is transferring data or in a wait
11 state but not terminated), then the timestamp of the socket is
12 updated with the current time of the arrival of the latest packet.
13 The purpose of the timestamp is for a background thread in the main
14 server to clean the obsolete (closed) socket entries in the database. The
15 background thread does this by subtracting the timestamp from the current
16 time and comparing this value with a defined (by the main server
17 programmer or administrator) timeout value. If the timeout value is
18 exceeded then the database entry is deleted. This means that the socket is
19 indeed broken.

20 After that, the packet is modified. The source IP and port of the
21 packet are preserved. The destination IP and port of the packet are
22 changed to the listening IP and the port of the participant is selected as
23 being geographically closest and with the best free resources in terms of
24 CPU usage, volatile and non-volatile memory, and bandwidth.

25 The participant server processes the request as if it was directly
26 requested by the client since the participant does not know from the IP
27 packet that it was routed from the main server and thinks that the packet
28 actually comes from the client since the packet has the source IP of the
29 client. The participant sends the requested object with the sender's
30 address (source IP) of the main server's IP address at the IP level. This

1 may require root privileges under Linux. Other requirements may apply to
2 other systems.

3 When the client makes another request using the main server's IP
4 address, the client requesting packages are routed to the main server, NOT
5 to the participant server. This is the "normal behavior" of today's
6 networking equipment (i.e. routers) and software.

7 In live stream and the participant does not have the file requested,
8 than the file is first downloaded to the participant and then sent to the
9 clients. In the lack of multicasting this will distribute the load of the
10 main server to the participant servers and thus would save costs because
11 adding participant servers would be relatively easy and cheap to add than
12 clustering more servers to the main server.

13 The present invention:

- 14 1. Provides the advantages of multicasting such as low server and
15 bandwidth costs but without multicasting supporting hardware.
- 16 2. Is fast and flexible - the number of participants can be changed
17 dynamically with little cost compared to upgrading the main server.
- 18 3. Is not difficult to implement.
- 19 4. Relies on the fact that multicasting equipment is expensive and
20 ISP's are reluctant to upgrade and unless most of the net is
21 equipped with multicasting machines, multicasting won't operate
22 efficiently.
- 23 5. Participants are safe in the network against attacks such as denial
24 of service attacks because their IP addresses are not revealed to
25 the clients, and thus hackers.

26 In operation, a main server is established. A participant Internet
27 surfer enters username, password, and other necessary information required
28 for financial processing to a form in a web page of the website of the
29 present invention. When a participant user decides to become active in
30 the system, it will surf to the website and enter his username, password.
31 The participant's computer will then load an applet (possibly written in

1 ActiveX or Java in 1999 terms) that will be the server software of the
2 "participant" (participant is the participating web surfer or company
3 computer). The applet will first calculate the participants CPU,
4 bandwidth, and memory power (and other necessary resources) and will start
5 a timer for the participant to start serving under rule of the main
6 server. Information about the participant will be recorded on a database
7 in the main server (main server may be any machine with at least one IP
8 address connected to the Internet backbone). When a web surfer requests
9 a file, the main server will search through its database of servers and
10 select the most appropriate server in terms of serving ability depending
11 on its previous evaluation of participants. The main server will command
12 the participant, via the open listening socket of the applet loaded in the
13 participant's machine, to serve the client. When the participant server
14 decides to go offline, the main server calculates the amount earned by the
15 participant Internet user and records it. At the end of a period,
16 participant person will get his money by check. The main server will have
17 the computing power of the net efficiently, cheaply, and dynamically at
18 its fingerprints. The main server will be the powerhouse between ISPs.

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(1) REAL PARTY IN INTEREST

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The party identified in the caption of the instant brief is the real party in interest pursuant to 37 CFR 1.192(c)(1).

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(2) RELATED APPEALS AND INTERFERENCES

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There are no appeals or interferences known to applicant's legal representative or assignee which will directly affect or be directly affected by or have a bearing on the Board's decision in pending appeals pursuant to 37 CFR 1.192(c)(2).

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(3) STATUS OF CLAIMS

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Claims 1-6 now pending in the application have been finally rejected and are on appeal. No claims have been cancelled.

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(4) STATUS OF AMENDMENTS

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No amendment has filed subsequent to the final rejection.

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(5) SUMMARY OF INVENTION

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Claim 1, the only independent apparatus claim on files, defines:

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1. An Internet system (20)[Figure 2], comprising:
 - a) a main server (22) for storing information (24) to be requested over the Internet (26) by a client (28) so as to form a request for information (30) and having an IP address (32)[page 17, lines 2-8]; and

1 b) at least one participant server (34) having an IP address (36)
2 and electrically communicating with said main server (22)[page
3 17, lines 9-11]; said at least one participant server (34) not
4 receiving the request for information (30) from the client
5 (28), but rather said main server (22) receiving the request
6 for information (30) over the Internet (26) from the client
7 (28) and requesting over the Internet (26) that said at least
8 one participant server (34) send the requested information
9 (30) over the Internet (26) back to the client (28)[page 17,
10 lines 12-17], and if said at least one participant server (34)
11 does not have the requested information (30), the requested
12 information (30) is downloaded from said main server (22) to
13 said at least one participant server (34)[page 17, lines 17-
14 21], and when said at least one participant server (34) sends
15 the requested information (24) over the Internet (26) back to
16 the client (28), said at least one participant server (34)
17 assigns to the requested information (24) said IP address (32)
18 of said main server (22) and not said IP address (36) of said
19 at least one participant server (34)[page 17, line 22 to page
20 18, line 2].

21 Claim 2, the first dependent apparatus claim on file, defines:

22 2. The system as defined in claim 1, wherein said main server (22) is
23 a TCP/IP server and assign jobs to said at least one participant
24 server (34) dynamically without relocating the client (28) using
25 neither HTTP nor HTML commands so as to take relocating process away
26 from top networking OSI layers to 3rd level of Internet working OSI
27 that is IP so as to enable starting downloading of the requested
28 information (24) from one of said at least one participant servers
29 (34) and finishing the downloading from another of said at least one

1 participant server (34) without ever noticing server alteration by
2 virtue of said at least one participant server (34) assigning to the
3 requested information (24) said IP address (32) of said main server
4 (22) and not said IP address (36) of said at least one participant
5 server (34)[page 18, lines 3-11].

6 Claim 3, the second dependent apparatus claim on file, defines:

7 3. The system as defined in claim 2, wherein said top networking OSI is
8 at least one of TCP, HTTP, and application level [page 18, lines 12-
9 12].

10 Claim 4, the only independent method claim on file, defines:

11 4. A method for using an Internet system (20), comprising the steps of
12 [Figures 3A-3D]:
13 a) making a request for information (30), over the Internet (26),
14 by a client (28), to a main server (22) of the Internet system
15 (20) and not to said at least one participant server (34)[page
16 18, lines 17-19][Figure 3A];
17 b) examining an IP address (38) of the client (28), by said main
18 server (22)[page 18, lines 23-24][Figure 3A];
19 c) seeking at least one participant server (34) of the Internet
20 system (20), by said main server (22), so as to form an at
21 least one nearest participant server (40)[page 18, lines 1-
22 3][Figure 3B];
23 d) requesting over the Internet (26), by said main server (22)
24 acting like an orchestra leader, that said at least one
25 nearest participant server (40) send the requested information
26 (24) to the client (28), packet-by-packet, over the Internet
27 (26)[page 19, lines 4-8][Figure 3B];

- 1 e) determining if said at least one nearest participant server
2 (40) has the requested information (24)[page 19, lines 9-
3 10][Figure 3B];
4 f) labeling, by said at least one nearest participant server
5 (40), each packet with an IP address (32) of said main server
6 (22), which enables the client (28) which has a port open only
7 for main server addresses to accept said packets, if answer to
8 step e) is yes [page 18, lines 11-15][Figure 3C];
9 g) sending the requested information (24) with said IP address
10 (32) of said main server (22), by said at least one nearest
11 participant server (40), to the client (28), over the Internet
12 (26)[Figure 3D];
13 h) downloading the requested information (24) from said main
14 server (22) to said at least one nearest participant server
15 (40), which will distribute the load of said main server (22)
16 to said at least one participant server (40) when lacking
17 multicasting so as to save costs, by virtue of said at least
18 one participant server (40) being relatively easy and
19 inexpensive to add as compared to clustering more servers to
20 said main server (22), if answer to STEP 5 is no [page 19,
21 line 20 to page 20, line 3][Figure 3C]; and
22 i) returning to step f) [page 20, line 4][Figure 3C].

23 Claim 5, the first dependent method claim on file, defines:

- 24 5. The method as defined in claim 4, wherein said step of making a
25 request for information (30), over the Internet (26), by the client
26 (28), from the main server (22) includes making the request for at
27 least one of a streaming video and an audio, over the Internet (26),
28 by the client (28), from the main server (22)[page 20, lines 5-9].

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(8) ARGUMENT

2

ISSUE I

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Whether claims 1 and 4 are unpatentable under 35 U.S.C. 103(a) over
Brendel et al. in view of Bell et al.

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Appellant respectfully draws the Examiner's attention to the fact
that the Federal Circuit holds that relevant case law must be relied upon
in determining obviousness ipso facto the determination of obviousness is
a matter of law, as was decided in In re Deuel, 51 F.3d 1552, 1557, 34
USPQ.2d (BNA) 1210, 1214 (Fed. Cir. 1995), where the Court held:

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"Obviousness is a
question of law, which
we review de novo,
though factual findings
underlying the Board's
o b v i o u s n e s s
determination are
reviewed for clear
error. In re Vaeck,
947 F.2d 488, 493, 20
USPQ2d 1438, 1442 (Fed.
Cir. 1991); In re
Woodruff, 919 F.2d 1575,
1577, 16 USPQ2d 1934,
1935 (Fed. Cir. 1990)."
[at 1214][Emphasis
added]

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And, in Richardson-Vicks Inc. v. The Upjohn Co., 122 F.3d 1476, 44
USPQ.2d 1181 (Fed. Cir. 1997), where the Court held:

"The difficulty with
RVI's position is that,
although the argument
has merit when the issue
is purely one of fact,
it does not follow when
the issue involves a
question of law. It is
black letter law that

1 the ultimate question of
2 obviousness is a
3 question of law. "See
4 Graham v. Deere Co., 383
5 U.S. 1, 17, 148 USPQ
6 459, 467 (1966) (citing
7 Great A. & P. Tea Co. v.
8 Supermarket Equip. Co.,
9 340 U.S. 147, 155, 87
10 USPQ 303, 309 (1950));
11 In re Donaldson Co., 16
12 F.3d 1189, 1192, 29
13 USPQ2d 1845, 1848 (Fed.
14 Cir. 1994) (en banc);
15 Texas Instruments Inc.
16 v. Unit States Int'l
17 Trade Comm'n, 988 F.2d
18 1165, 1178, 26 USPQ2d
19 1018, 1028 (Fed. Cir.
20 1993). And we review
21 that legal question
22 without deference to the
23 trial court. See
24 Gardner V. TEC Sys.
25 Inc., 725 F.2d 1338,
26 1344, 220 USPQ 777, 782
27 (Fed. Cir. 1984)
28 (district court's
29 conclusion on
30 obviousness "is one of
31 law and subject to full
32 and independent review
33 in this court"). "[at
34 1183][Emphasis added]

35 In the seminal case of Graham v. John Deere Co., 383 U.S. 1, 17, 148
36 USPQ 459, 467, 15 L.Ed. 2d 545, 86 S. Ct. 684 (1966), the Supreme Court
37 articulated the requirements for a prima facie holding of obviousness.
38 The Patent Office has since set forth in MPEP 706.02 a three step
39 requirement for establishing a prima facie case of obviousness.

40 The first step requires that the Examiner must set forth the
41 differences in the claim over the applied references. The second step
42 requires that the Examiner must set forth the proposed modification of the

1 reference which would be necessary to arrive at the claimed subject
2 matter. And, the third step requires that the Examiner must explain why
3 the proposed modification would be obvious.

4 The Courts require that in order to satisfy the third step for
5 establishing a prima facie case of obviousness, the Examiner must identify
6 where the prior art provides a motivating suggestion to make the
7 modifications proposed in the second step for establishing a prima facie
8 case of obviousness, as was expressed in the 1992 Federal Circuit Court
9 decision in In re Jones, 958, F.2d 347, 21 USPQ.2d 1941, where the Court
10 held:

11 "Contention that one
12 skilled in the
13 herbicidal art would
14 have been motivated to
15 use, with acid commonly
16 known as "dicamba,"
17 substituted ammonium
18 salt such as that
19 disclosed in two prior
20 references does not
21 warrant holding that
22 claimed substituted
23 ammonium salt of dicamba
24 for use as herbicide is
25 prima facie obvious,
26 since there is no
27 suggestion for combining
28 disclosures of those
29 references either in
30 references themselves,
31 which are directed to
32 shampoo additives and
33 production of
34 m o r p h o l i n e ,
35 respectively, or in
36 knowledge generally
37 available to those
38 skilled in the art."[at
39 1941][Emphasis added]

1 "The Solicitor points
2 out that, given the
3 breadth of forms of
4 dicamba (free acid,
5 ester, or salt)
6 disclosed by Richter as
7 having herbicidal
8 utility, one of ordinary
9 skill in the art would
10 appreciate that the
11 dicamba group has
12 significance with
13 respect to imparting
14 herbicidal activity to
15 dicamba compounds.
16 Thus, the solicitor
17 contends, one skilled in
18 the art would have been
19 motivated to uses, with
20 dicamba, substituted
21 ammonium salts made from
22 a known amine, such as
23 the amine disclosed by
24 Zorayan and Wideman, and
25 would have expected such
26 a salt to have
27 herbicidal activity.
28 Before the PTO may
29 combine the disclosures
30 of two or more prior art
31 references in order to
32 establish prima facie
33 obviousness, there must
34 be some suggestion for
35 doing so, found either
36 in the references
37 themselves or in the
38 knowledge generally
39 available to one of
40 ordinary skill in the
41 art." In re Fine, 837
42 F.2d 1071, 1074, 5
43 USPQ2d 1596, 1598-99
44 (Fed. Cir. 1988). We
45 see no such suggestion
46 in Zorayan, which is

1 directed to shampoo
2 additives, nor Wideman,
3 which teaches that the
4 amine used to make the
5 claimed compound is a
6 byproduct of the
7 production of
8 morpholine. Nor does
9 the board disclosure of
10 Richter fill the gap,
11 for the reasons
12 discussed above."[at
13 1943][Emphasis added]

14 And, in Arkie Lures, Inc. v. Gene Larew Tackle, Inc., 912 F.Supp.
15 422, 38 USPQ.2d 1300 (W.D.Ark. 1996), where the Court held:

16 "The existence of
17 separate elements of the
18 invention in the prior
19 art is insufficient to
20 establish obviousness,
21 absent some teaching or
22 suggestion in the prior
23 art to combine the
24 elements." [Emphasis
25 added]

26 And, in Gambro Lundia AB v. Baxter Healthcare Corporation, 110 F.3d
27 1573, 42 USPQ.2d 1378 (Fed. Cir. 1997), where the court held:

28 "Without a suggestion or
29 teaching to combine, a
30 case of obviousness is
31 deficient." [Emphasis
32 added]

33 The Courts further require, however, that even if the prior art may
34 be modified as suggested by the Examiner, the modification is not made
35 obvious unless the prior art suggests the desirability of the
36 modification, as was expressed in the 1992 Federal Circuit Court decision
37 in In re Fritch, 922, F.2d 1260, 23 USPQ.2d 1780, where the Court held:

38 "Mere fact that prior
39 art may be modified to
40 reflect features of

1 claimed invention does
2 not make modification,
3 and hence claimed
4 invention, obvious
5 unless desirability of
6 such modification is
7 suggested by prior art
8"[at 1780][Emphasis
9 added]

10 "The mere fact that the
11 prior art may be
12 modified in the manner
13 suggested by the
14 Examiner does not make
15 the modification obvious
16 unless the prior art
17 suggested the
18 desirability of the
19 modification. In re
20 Gordon, 733 F.2d at 902,
21 221 USPQ at 1127."[at
22 1783][Emphasis added]

23 And further, the Fritch Court at 1783, held that the patent
24 applicant may attack the Examiner's prima facie determination as
25 improperly made out and tending to support a conclusion of nonobviousness:

26 "In proceedings before
27 the Patent and Trademark
28 Office, the Examiner
29 bears the burden of
30 establishing a prima
31 facie case of
32 obviousness based upon
33 the prior art...[The
34 Examiner] can satisfy
35 this burden only by
36 showing some objective
37 teaching in the prior
38 art or that knowledge
39 generally available to
40 one of ordinary skill in
41 the art would lead to
42 that individual to
43 combine the relevant

1 teachings of the
2 references. The patent
3 applicant may then
4 attack the Examiner's
5 prima facie
6 determination as
7 improperly made out, or
8 the applicant may
9 present objective
10 evidence tending to
11 support a conclusion of
12 nonobviousness."
13 [Emphasis added]

14 In this same regard, the Examiner's attention is respectfully drawn
15 to the decisions in Heidelberger Druckmaschinen AG v. Hantscho Commercial
16 Products, Inc., 21 F.3d 1068, 30 USPQ.2d 1377; In re Fine, 837 F.2d 1071,
17 5 USPQ.2d 1596 (Fed. Cir. 1988); In re Keller, 642 F.2d 413, 208 USPQ 871
18 (CCPA 1981); and In re Merck & Co., Inc., 800 F.2d 1091, 231 USPQ 375
19 (Fed. Cir. 1986).

20 In properly applying the Graham v. John Deere Co. test in light of,
21 inter alia, In re Jones, and In re Fritch discussed supra, the Examiner
22 must conduct a rigorous examination and analysis of the prior art. It
23 would appear that the Examiner has not done so.

24 Neither Brendel et al., Bell et al., nor for that matter any of the
25 references cited by the Examiner, make any motivating suggestion that,
26 inter alia the system of Brendel et al. can be modified to have its
27 outgoing address replaced by the outgoing address of Bell et al., as
28 suggested by the Examiner.

29 The Examiner has merely combined elements in a piecemeal manner in
30 light of appellant's disclosure to show obviousness by using appellant's
31 own specification as though it were prior art and in doing so has violated
32 the basic mandate inherent in 35 U.S.C. 103, as was decided in In re Kamm
33 and Young, 17 USPQ 298 ff, where the Court held:

34 "The rejection here runs
35 afoul of a basic mandate

1 inherent in section 103
2 - that a piecemeal
3 reconstruction of the
4 prior art patents in the
5 light of appellants'
6 disclosure shall not be
7 the basis for a holding
8 of obviousness."
9 [Emphasis added]

10 And, in In re Stephens, Wenzl, and Browne, 145 USPQ 656 (CCPA 1965),
11 where the Court reversed a rejection on a combination of references and
12 held:

13 "References may not be
14 c o m b i n e d
15 indiscriminately and
16 with guidance from
17 applicant's disclosure
18 to show that the claims
19 are unpatentable."[at
20 656][Emphasis added]

21 "In our consideration of
22 the record in light of
23 appellants' arguments,
24 we find nothing which
25 demonstrates that the
26 examiner and the board
27 erred in rejecting the
28 claims. While we agree
29 with appellants that
30 references may not be
31 c o m b i n e d
32 indiscriminately and
33 with guidance from
34 appellants' disclosure
35 to show that claims are
36 unpatentable, we think
37 the combination of
38 references her is proper
39 and adequately suggests
40 the structure appellants
41 have achieved."[at 657]
42 [Emphasis added]

1 And, in Panduit Corp. v. Burndy Corporation et al., 180 USPQ 498
2 (District Court, N.D. Illinois, E. Div.), where the Court held:

3 "Inquiry into the
4 patentability must be
5 directed toward subject
6 matter as a whole and
7 not to elements of a
8 combination and their
9 individual novelty;
10 combination which
11 results in a more
12 facile, economical, or
13 efficient unit, or which
14 provides results
15 unachieved by prior art
16 structures, cannot be
17 anticipated piecemeal by
18 showing that elements
19 are individually old."
20 [at 498][Emphasis added]

21 "The inquiry into the
22 patentability must be
23 directed toward the
24 subject matter as a
25 whole and not to the
26 elements of the claimed
27 combination and their
28 individual novelty, and
29 therefore a patented
30 combination which
31 results in a more
32 facile, economical or
33 efficient unit, or which
34 provides results
35 unachieved by prior art
36 structures, cannot be
37 anticipated piecemeal by
38 showing that the various
39 elements of the
40 invention are
41 individually old.
42 The difference between
43 the subject matter set
44 forth in the Re. 26,492

1 patent and the subject
2 matter of the cited
3 prior art references as
4 a whole would not have
5 been obvious at the time
6 the invention was made
7 to a person of ordinary
8 skill in the art to
9 which such subject
10 matter pertains, under
11 35 U.S.C. 103.[at 505]
12 [Emphasis added]

13 And, in Monarch Knitting Mach. Corp. v. Sulzer Morat GmbH, 139 F.3d
14 877, 45 USPQ.2d 1977 (Fed. Cir. 1998), where the Court held:

15 "Federal district
16 court's formulation of
17 problem confronting
18 inventors of needles for
19 automatic knitting
20 machine presumes their
21 solution to problem,
22 namely modification of
23 "stem segment" of
24 needles; defining
25 problem in terms of its
26 solution reveals
27 improper hindsight in
28 selection of prior art
29 relevant to obviousness,
30 resulted in district
31 court adopting overly
32 narrow view of scope of
33 prior art, and infected
34 district court's
35 determinations about
36 content of prior art."
37 [at 1978][Emphasis
38 added]

39 "To ascertain the scope
40 of the prior art, a
41 court examines "the
42 field of the inventor's
43 endeavor," Shatterproof

1 Glass Corp. v. Libbey-
2 Owens Ford Co., 758 F.2d
3 613, 620, 225 USPQ 634,
4 628 (Fed. Cir. 1985),
5 and "the particular
6 problem with which the
7 inventor was involved,"
8 Stratoflex, Inc. v.
9 Aerquip Corp., 713 F.2d
10 1530, 1535, 218 USPQ
11 871, 876 (Fed. Cir.
12 1983) (quoting In re
13 Wood 599 F.2d 1032,
14 1036, 202 USPQ 171, 174
15 (CCPA 1979)), at the
16 "time the invention was
17 made," see 35 U.S.C. 8
18 103(a). The district
19 court defined the
20 problem as "designing
21 the stem segment of a
22 knitting needle...[to]
23 minimize[] needle head
24 breakage and thus
25 maximize[] the operating
26 speed of an industrial
27 knitting machine."
28 (emphasis added). The
29 '053 patent, on the
30 other hand, describes
31 the inventor's problem
32 as "providing [knitting
33 needles] with a means
34 which avoids head
35 breakages or lets
36 [breakages] start to an
37 extent worth mentioning
38 only at higher knitting
39 speeds." '053 patent,
40 col. 1, lines 48-51.
41 The district court's
42 formulation of the
43 problem confronting the
44 '053 inventors presumes
45 the solution to the
46 problem - modification

1 of the stem segment.
2 defining the problem in
3 terms of its solution
4 reveals improper
5 hindsight in the
6 selection of the prior
7 art relevant to
8 obviousness. See, e.g.
9 In re Antle, 444 F.2d
10 1168, 1171-72, 170 USPQ
11 285, 287-88 (CCPA 1971)
12 (warning against
13 selection of prior art
14 with hindsight). By
15 importing the ultimate
16 solution into the
17 problem facing the
18 inventors, the district
19 court adopted an overly
20 narrow view of the scope
21 of the prior art. It
22 also infected the
23 district court's
24 determinations about the
25 content of the prior
26 art."[at 1981][Emphasis
27 added]

28 And, in In re Rouffet, 149 F.3d 1350, 47 USPQ.2d 1453 (Fed. Cir.
29 1998), where the Court reversed the Board's decision in which the level of
30 skill in the art being high was not sufficient to supply motivation:

31 "Three possible sources
32 for motivation to
33 combine prior art
34 references in manner
35 that would render
36 claimed invention
37 obvious are nature of
38 problem to be solved,
39 teachings of prior art,
40 and knowledge of persons
41 of ordinary skill in
42 art; high level of skill
43 in field of art cannot
44 be relied upon to

1 provide necessary
2 motivation absent
3 explanation of what
4 specific understanding
5 or technical principle,
6 within knowledge one of
7 ordinary skill in art,
8 would have suggested
9 combination, since if
10 such rote invocation
11 could suffice to supply
12 motivation to combine,
13 more sophisticated
14 scientific fields would
15 rarely, if ever,
16 experience patentable
17 technical advance."[at
18 1453][Emphasis added]

19 "Claimed low orbit
20 satellite communication
21 system for mobile
22 terminals is not prima
23 facie obvious over
24 combination of two prior
25 art references, even
26 though person possessing
27 high level of skill
28 characteristic of this
29 field would know to
30 account for differences
31 between claimed
32 invention and prior art
33 combination, since high
34 level of skill in art,
35 without more, cannot
36 supply required
37 motivation to combine
38 references, and does not
39 overcome absence of any
40 actual suggestion to
41 combine; obviousness
42 rejection will not be
43 upheld, even where skill
44 in art is high, absent
45 specific identification

1 of principle, known to
2 one of ordinary skill,
3 that suggests claimed
4 combination."[at 1454]
5 [Emphasis added]

6 Furthermore, pursuant to 37 CFR 1.111(c), claims 1 and 4 define the
7 following advantageous distinctive features, that distinguish over, and
8 avoid, the prior art:

- 9 a) "...said main server...
10 requesting over the
11 Internet that said at
12 least one participant
13 server send the
14 requested information
15 over the Internet back
16 to the client..."[claim
17 1][Emphasis added];
- 18 b) "...if said at least one
19 participant server does
20 not have the requested
21 information, the
22 requested information is
23 downloaded from said
24 main server to said at
25 least one participant
26 server..."[claim 1]
27 [Emphasis added];
- 28 c) "requesting over the
29 Internet, by said main
30 server acting like an
31 orchestra leader, that
32 said at least one
33 nearest participant
34 server send the
35 requested information
36 over the Internet back
37 to the client..."[claim
38 4][Emphasis added]; and
- 39 d) "downloading the
40 requested information
41 from said main server to

1 said at least one
2 nearest participant
3 server..."[claim 4]
4 [Emphasis added].

5 It was decided in In re Miller, 169 USPQ 597 (CCPA 1971) that each
6 and every limitation, inter alia those discussed supra, must be met in
7 determining patentability:

8 "All words in a claim
9 must be considered in
10 j u d g i n g t h e
11 patentability of that
12 claim against the prior
13 art."[at 600][Emphasis
14 added]

15 In this same regard, the Examiner's attention is respectfully
16 directed to the decisions in In re Fuetterer, 138 USPQ 217 (CCPA 1963);
17 and In re Ludke and Sloan, 169 USPQ 563 (CCPA 1971).

18 When the Internet system of the present invention is designed in
19 accordance with the advantageous distinctive features of claims 1 and 4
20 discussed supra, inter alia:

- 21 1. The at least one participant server can be located anywhere in the
22 world regardless of where in the world the main server is located
23 ipso facto "...said main server... requesting over the Internet that
24 said at least one participant server send the requested information
25 over the Internet back to the client..."[claim 1][Emphasis added]
26 and "requesting over the Internet, by said main server acting like
27 an orchestra leader, that said at least one nearest participant
28 server send the requested information over the Internet back to the
29 client..."[claim 4][Emphasis added], as opposed to the main server
30 communicating with the at least one participant server over a
31 discrete and/or distinct and/or dedicated connection.
- 32 2. Costly multicasting [the at least one participant server is
33 relatively easy and inexpensive to add as compared to clustering
34 more servers to the main server] is not required if the at least one

1 participant server does not contain the requested information ipso
2 facto "...if said at least one participant server does not have the
3 requested information, the requested information is downloaded from
4 said main server to said at least one participant server..."[claim
5 1][Emphasis added] and "downloading the requested information from
6 said main server to said at least one nearest participant server..."
7 [claim 4][Emphasis added].

8 Even though the advantageous features of the present invention
9 discussed supra may not have been disclosed and discussed specifically in
10 the specification of the patent application as it was originally filed,
11 they still must be relied upon as evidence of patentability, as was
12 decided in In re Chu, 66 F.3d 292, 36 USPQ.2d 1089 (Fed. Cir. 1995), where
13 the Court held:

14 "Board of Patent Appeals
15 and Interferences erred,
16 in upholding obviousness
17 rejection of applicant's
18 claims, by concluding
19 that claims' disclosure
20 was matter of "design
21 choice," and that the
22 applicant's evidence and
23 arguments to contrary
24 are not present in
25 specification and are
26 therefore unpersuasive,
27 since board is required
28 to consider totality of
29 record and is not free
30 to disregard evidence
31 and arguments presented
32 by applicants, and since
33 there is no support for
34 proposition that
35 evidence and/or
36 arguments traversing 35
37 USC 103 rejection must
38 be contained within
39 specification, given

1 that obviousness is
2 determined by totality
3 of record including, in
4 some instances most
5 significantly, evidence
6 and arguments proffered
7 during give-and-take of
8 ex parte patent
9 prosecution."[at 1090]
10 [Emphasis added]

11 "Because the Board was
12 required to consider the
13 totality of the record,
14 the Board was not free
15 to disregard the
16 evidence and arguments
17 presented by Chu in
18 response to the
19 obviousness rejection.
20 Additionally, the Board
21 erred in apparently
22 requiring Chu's evidence
23 and arguments responsive
24 to the obviousness
25 rejection to be within
26 his specification in
27 order to be considered.
28 To require Chu to
29 include evidence and
30 arguments in the
31 specification regarding
32 whether placement of the
33 SCR catalyst in the bag
34 retainer was a matter of
35 "design choice" would be
36 to require patent
37 applicants to divine the
38 rejections the PTO will
39 proffer when patent
40 applications are filed."
41 [at 1094][Emphasis
42 added]

43 "We have found no cases
44 supporting the position

1 that a patent
2 applicant's evidence
3 and/or arguments
4 traversing a 8 103
5 rejection must be
6 contained within the
7 specification. There is
8 no logical support for
9 such a proposition as
10 well, given that
11 obviousness is
12 determined by the
13 totality of the record
14 including, in some
15 instances, most
16 significantly, the
17 evidence and arguments
18 proffered during the
19 give-and-take of ex
20 parte patent
21 prosecution."[at 1095]
22 [Emphasis added]

23 And, even though the present invention may be considered simple and
24 accomplishes only a small but genuine improvement by some is not
25 sufficient reason to deny it patent protection, as was decided in Schnell
26 et al. v. The Allbright-Nell Company et al., 146 USPQ 322 (Court of
27 Appeals, Seventh Circuit 1965), where the Court held:

28 "Device seems simple and
29 obvious in light of
30 patentee's teaching, but
31 it evidently was not
32 obvious at time of
33 invention; those working
34 in the field did not
35 accomplish patentee's
36 results; that fact
37 supports conclusion that
38 patentee achieved
39 patentable invention."
40 [at 322][Emphasis added]

41 "This now seems simple
42 and obvious in the light

1 of the Schnell teaching,
2 but is was evidently not
3 at all obvious at the
4 time of the invention.
5 Those working in the
6 field did not accomplish
7 Schnell's results. That
8 fact supports the
9 conclusion that Schnell
10 achieved patentable
11 inventions. Pyle Nat.
12 Co. v. Lewin, 7 Cir.,
13 1937, 92 F.2d 628, 630,
14 35 USPQ 40, 42."[at 324]
15 [Emphasis added]

16 The Board of Appeals expressed the same concept when it held in Ex
17 parte Grasenick and Gessner, 158 USPQ 624 (Patent Office Board of Appeals
18 1967), that:

19 "Improvement over prior
20 art, even though it be
21 simple or involves only
22 a reversing of certain
23 parts, is patentable
24 unless prior art shows
25 that improvement is
26 obvious."[at 624]
27 [Emphasis added]

28 "This rejection is in
29 error. An improvement
30 over the prior art, even
31 though it be simple or
32 involves only a
33 reversing of certain
34 parts, is patentable
35 unless the prior art
36 shows the improvement to
37 be obvious. The
38 examiner has neither
39 cited evidence
40 establishing the
41 obviousness of
42 appellant's modification
43 of the prior art nor

1 demonstrated that the
2 improved results claimed
3 by appellants are not
4 available from their
5 construction."[at 624]
6 [Emphasis added]

7 Attention is also respectfully directed in this regard to the
8 decisions in Mercantile National Bank of Chicago et al v. Quest, Inc. et
9 al. DC., N.D. Indiana, 166 USPQ 517; In re Shelby, 136 USPQ 220; and In re
10 Irani and Moedritzer, 166 USPQ 24, which all indicate that simplicity does
11 not operate as a bar to patentability if the invention was unobvious at
12 the time it was made.

13 Turning now to the references, and with regard to advantageous
14 distinctive features a) and c) of claims 1 and 4, respectively, discussed
15 supra, contrary to the Examiner's statement made at page 4, paragraph 13,
16 subparagraph 3, lines 3-6 of the Final Rejection, Brendel et al. does not
17 teach "...said main server... requesting over the Internet that said at
18 least one participant server send the requested information over the
19 Internet back to the client..." [claim 1][Emphasis added] or "requesting
20 over the Internet, by said main server acting like an orchestra leader,
21 that said at least one nearest participant server send the requested
22 information over the Internet back to the client..."[claim 4][Emphasis
23 added], but rather teaches that the load balancer 70 (relied upon by the
24 Examiner at page 4, paragraph 13, subparagraph 3, line 6 of the Final
25 Rejection as the main server of the present invention) communicates with
26 a server 52 (relied upon by the Examiner at page 4, paragraph 13,
27 subparagraph 3, line 6 of the Final Rejection as the at least one
28 participant server of the present invention) over the discrete and/or
29 distinct and/or dedicated connection 120 that is independent of Internet
30 66, as shown in figure 8 of Brendel et al. (relied upon by the Examiner).

31 With this arrangement of Brendel et al., the server 52 cannot be
32 located anywhere in the world regardless of where in the world the load

1 balancer 70 is located ipso facto the load balancer 70 communicates with
2 the server 52 over the discrete and/or distinct and/or dedicated
3 connection 120.

4 Additionally, Brendel et al. disclose at col. 20, lines 34-37:

5 "The web farm has been
6 described as having a
7 "local" network, but
8 this local network could
9 be local only in the
10 sense that it is not the
11 Internet backbone."

12 Brendel et al. teach communicating between the scheduler and the
13 server with a proprietary (OSI 3rd level) protocol called IXP.

14 In contradistinction, the present invention teaches communicating
15 with the participants (the equivalent of web servers in Brendel et al.)
16 from the main server (the scheduler) with the standard IP (Internet
17 Protocol) protocol so that the present invention can reside where there is
18 no specialized frame relay or ISDN or leased line communication between
19 the scheduler and the participant and when there is only a standard
20 Internet connection that is using the Internet backbone, which Brendel et
21 al. simply cannot do.

22 With regard to advantageous distinctive features b) and d) of claims
23 1 and 4, respectively, discussed supra, contrary to the Examiner's
24 statement made at page 5, lines 6-8 of the Final Rejection, Brendel et al.
25 does not teach "...if said at least one participant server does not have
26 the requested information, the requested information is downloaded from
27 said main server to said at least one participant server..."[claim 1]
28 [Emphasis added] or "downloading the requested information from said main
29 server to said at least one nearest participant server..."[claim 4]
30 [Emphasis added], but rather teaches that the information downloaded from
31 the load balancer 70 to the server 52 is not the requested information but
32 rather is the browser's stored ACK packet, as shown in the middle of
33 figure 11A of Brendel et al. where it is disclosed that ACK(0) is

1 forwarded from the load balancer 70 to the server connected to the client
2 and as discussed at col. 12, lines 50-52 of Brendel et al. (relied upon by
3 the Examiner at page 5, lines 8-9 of the Final Rejection), where it is
4 disclosed:

5 "The load balancer then
6 sends the browsers
7 stored ACK packet to the
8 assigned server...."
9 [Emphasis added]

10 And, wherein the ACK(0) packet is an acknowledgment packet by the
11 browser 10 to the load balancer 70, as discussed at col. 12, lines 17-19
12 of Brendel et al., where it is disclosed:

13 "The load balancer
14 replies with a SYN/ACK
15 packet to the browser,
16 and the browser replies
17 with an acknowledgment
18 packet, ACK(0)."
19 [Emphasis added]

20 With this arrangement of Brendel et al., costly multicasting would
21 be required if the servers other than that containing the load balancer
22 did not contain the requested information.

23 As can be seen, Brendel et al. teaches away from the present
24 invention, a fact that must be considered in determining obviousness, as
25 was decided in General Tire and Rubber Co. v. Firestone Tire and Rubber
26 Co., 174 USPQ at 445, where the Court held:

27 "In assessing the prior
28 art, the Court must have
29 regard for all of the
30 signposts contained in
31 it. It must consider
32 the passages and
33 references which point
34 away from the invention
35 as well as those said to
36 point toward it..."
37 [Emphasis added]"

1 To properly apply the decisional law of General Tire and Rubber Co.
2 v. Firestone Tire and Rubber Co., one must first define what is considered
3 "teaching away." The definition of "teaching away" was succinctly
4 expressed in United States v. Adams, 383 U.S. 39, 52, 148 USPQ 479,484, 15
5 L.Ed.2D 572, 86 S.Ct. 708 (1966); and W.L. Gore & Assoc., v. Garlock,
6 Inc., 721 F.2d 1540, 1550-51, 220 USPQ 303, 311 (Fed. Cir. 1983), cert.
7 denied, 469 U.S. 851 (1984), where the Court held:

8 "a reference teaches
9 away if it suggests that
10 the line of development
11 flowing from the
12 reference's disclosure
13 is unlikely to be
14 productive of the result
15 sought by the
16 applicant." [Emphasis
17 added]

18 The connection between the load balancer and the server of Brendel
19 et al. being through a discrete and/or distinct and/or dedicated
20 connection that is independent of the Internet results in the servers not
21 being able to be located anywhere in the world regardless of where in the
22 world the load balancer is located and is therefore non-productive in
23 producing the connection between the main server and the at least one
24 participant server of the present invention being through the Internet
25 which results in the at least one participant server being able to be
26 located anywhere in the world regardless of where in the world the main
27 server is located. Therefore, pursuant to W.L. Gore & Assoc., v. Garlock,
28 Inc. discussed supra, Brendel et al. teach away from the present
29 invention.

30 The information downloaded from the load balancer to the server of
31 Brendel et al. being the browser's stored ACK packet would require costly
32 multicasting if the servers other than that containing the load balancer
33 did not contain the requested information and would therefore be non-
34 productive in producing the information downloaded from the main server to

1 the at least one participant server of the present invention that is the
2 requested information and therefore would not require costly multicasting
3 if the at least one participant server does not contain the requested
4 information. Therefore, pursuant to W.L. Gore & Assoc., v. Garlock, Inc.
5 discussed supra, Brendel et al. again teach away from the present
6 invention.

7 Brendel et al. would therefore lead a reader in a path divergent
8 from the path that was taken by appellant and therefore "teaches away"
9 from the present invention and can not be used to create a prima facie
10 case of obviousness, as was decided in In re Gurley, 27 F.3d 551, 31, 31
11 USPQ.2d at 1130 (Fed. Cir. 1994), where the Court held:

12 "a reference may be said
13 to teach away when a
14 person of ordinary
15 skill, upon reading the
16 reference would be led
17 in a direction divergent
18 from the path that was
19 taken by the applicant
20 ...a reference that
21 "teaches away" can not
22 create a prima facie
23 case of obviousness."
24 [Emphasis added]

25 The signposts of Brendel et al. that teach away from the present
26 invention must be considered in creating a holding of obviousness, as
27 required by General Tire and Rubber Co. v. Firestone Tire and Rubber Co.,
28 United States v. Adams, W.L. Gore & Assoc., v. Garlock, Inc., and In re
29 Gurley discussed supra which when analyzed will clearly indicate that the
30 Examiner's combination is improper.

31 Appellant has provided clear and convincing evidence that neither
32 Brendel et al., Bell et al., nor for that matter any of the references
33 cited by the Examiner, accomplish appellant's result of providing an
34 efficient Internet system that, inter alia:

1 1. Enables the at least one participant server to be located anywhere
2 in the world regardless of where in the world the main server is
3 located.

4 2. Eliminates a need for costly multicasting if the at least one
5 participant server does not contain the requested information.

6 Therefore a holding of obviousness cannot be made out, as was
7 decided by the Board of Appeals in Ex parte Tanaka, Marushima and
8 Takahashi, 174 USPQ 38, where the Board held:

9 "Claims are not rejected
10 on the ground that it
11 would be obvious to one
12 of ordinary skill in the
13 art if the prior art
14 devices do not
15 accomplish applicant's
16 result."[Emphasis added]

17 And, in In re Wright, 122 USPQ 522 (1959), where the Court held:

18 "...the mere aggregation
19 of old elements that did
20 not perform a different
21 function is not a
22 patentable invention,
23 but that a novel
24 combination of old
25 elements which cooperate
26 with each other to
27 produce a new or useful
28 result or a substantial
29 increase in efficiency
30 is patentable."[Emphasis
31 added]

32 And, further in the en banc decision in In re Dillon, 919 F.2d 688,
33 692 (Fed. Cir. 1990), where the Court held:

34 "...a prima facie case
35 of obviousness requires
36 that the prior art
37 suggest the claimed
38 compositions' properties
39 and the problem the

1 applicant attempts to
2 solve."[Emphasis added]

3 In this same regard, the Examiner's attention is respectfully
4 directed to the decisions in In re Halleck, 164 USPQ 647 (CCPA 1970); and
5 Kockum Industries, Inc. v. Salem Equipment, Inc., 175 USPQ 81 (9th Cir.
6 1972).

7 In light of, inter alia In re Deuel, Richardson-Vicks Inc. v. The
8 Upjohn Co., the Graham v. John Deere Co. test in light of, inter alia MPEP
9 706.02, In re Jones, Arkie Lures, Inc. v. Gene Larew Tackle, Inc., Gambro
10 Lundia AB v. Baxter Healthcare Corporation, In re Fritch, Heidelberger
11 Druckmaschinen AG v. Hantscho Commercial Products, Inc., In re Fine, In re
12 Keller, and In re Merck & Co., Inc., In re Kamm and Young, In re Stephens,
13 Wenzl, and Browne, Panduit Corp. v. Burndy Corporation et al., Monarch
14 Knitting Mach. Corp. v. Sulzer Morat GmbH, In re Rouffet, In re Miller, In
15 re Fuetterer, In re Ludke and Sloan, In re Chu, Schnell et al. v. The
16 Allbright-Nell Company et al., Ex parte Grasenick and Gessner, Mercantile
17 National Bank of Chicago et al v. Quest, Inc. et al., In re Shelby, In re
18 Irani and Moedritzer, General Tire and Rubber Co. v. Firestone Tire and
19 Rubber Co., United States v. Adams, W.L. Gore & Assoc. v. Garlock, Inc.,
20 In re Gurley, Ex parte Tanaka, Marushima and Takahashi, In re Wright, In
21 re Dillon, In re Halleck, and Kockum Industries, Inc. v. Salem Equipment,
22 Inc. discussed supra, pursuant to In re Fritch discussed supra appellant
23 attacks the Examiner's prima facie determination as being improperly made
24 out and tending to support a conclusion of nonobviousness.

25 In view of the arguments presented supra, appellant respectfully
26 submits that the Examiner's grounds for the Examiner's rejection of claims
27 1 and 4 under 35 U.S.C. 103(a) over Brendel et al. in view of Bell et al.
28 are no longer tenable and appellant therefore respectfully requests that
29 the rejection be reversed.

1

ISSUE II

2

Whether claim 2 is anticipated under 35 U.S.C. 102(e) by Bell et al.

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Appellant respectfully submits that it is well settled that a dependent claim must be considered in determining patentability as including the limitations of the claim(s) from which it depends, as was supported in In re Schutte, 244 F.2d 323, 327 (CCPA 1957), where the Court held:

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"a dependent claim must
be read as including the
limitations of the claim
from which it depends."
[Emphasis added]

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Claim 2 depends from claim 1 and therefore includes all of the limitations of claim 1. Appellant is in a quandary as to how claim 2 can be rejected under 35 U.S.C. 102 when claim 2 depends from claim 1 which is rejected under 35 U.S.C. 103. Accordingly, appellant cannot address this issue, submits herewith a memorandum of law in opposition thereto, and absent correction will petition the Commissioner.

19

ISSUE III

20

21

Whether claims 3, 5, and 6 are anticipated under 35 U.S.C. 102(a) by Brendel et al.

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Claim 3 depends from claims 1 and 2 and therefore includes all of the limitations of claims 1 and 2 and claims 5 and 6 depend from claim 4 and therefore includes all of the limitations of claim 4. Again, appellant is in a quandary as to how claim 3 can be rejected under 35 U.S.C. 102 when claim 3 ultimately depends from claim 1 which is rejected under 35 U.S.C. 103 and as to how claims 5 and 6 can be rejected under 35

1 U.S.C. 102 when claims 5 and 6 depend from claim 4 which is rejected under
2 35 U.S.C. 103. Accordingly, again appellant cannot address this issue,
3 submits herewith the memorandum of law in opposition thereto, and again
4 absent correction will petition the Commissioner.

1

CONCLUSION

2 Appellant respectfully submits for the Board's consideration that
3 even if a valid combination could be made, which appellant does not
4 contend as discussed in the argument section supra, since neither Brendel
5 et al., Bell et al., nor for that matter any of the references cited by
6 the Examiner, taken singularly teaches "...said main server...requesting
7 over the Internet that said at least one participant server send the
8 requested information over the Internet back to the client..."[claim
9 1][Emphasis added], "...if said at least one participant server does not
10 have the requested information, the requested information is downloaded
11 from said main server to said at least one participant server..."[claim
12 1][Emphasis added], "requesting over the Internet, by said main server
13 acting like an orchestra leader, that said at least one nearest
14 participant server send the requested information over the Internet back
15 to the client..."[claim 4][Emphasis added], and "downloading the requested
16 information from said main server to said at least one nearest participant
17 server..."[claim 4][Emphasis added], any hypothetical combination thereof
18 would not lead to appellant's invention.

TABLE OF AUTHORITIES

2	Arkie Lures, Inc. v. Gene Larew Tackle, Inc., 912 F.Supp. 422, 38 USPQ.2d	
3	1300 (W.D.Ark. 1996)	18, 39
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- 2 U.S. Patent Number 5,774,660 to Brendel et al.
3 U.S. Patent Number 5,923,854 to Bell et al.

APPENDIX

1

2 1. An Internet system, comprising:

3 a) a main server for storing information to be requested over the
4 Internet by a client so as to form a request for information
5 and having an IP address; and

6 b) at least one participant server having an IP address and
7 electrically communicating with said main server; said at
8 least one participant server not receiving the request for
9 information from the client, but rather said main server
10 receiving the request for information over the Internet from
11 the client and requesting over the Internet that said at least
12 one participant server send the requested information over the
13 Internet back to the client, and if said at least one
14 participant server does not have the requested information,
15 the requested information is downloaded from said main server
16 to said at least one participant server, and when said at
17 least one participant server sends the requested information
18 over the Internet back to the client, said at least one
19 participant server assigns to the requested information said
20 IP address of said main server and not said IP address of said
21 at least one participant server.

22 2. The system as defined in claim 1, wherein said main server is a
23 TCP/IP server and assign jobs to said at least one participant
24 server dynamically without relocating the client using neither HTTP
25 nor HTML commands so as to take relocating process away from top
26 networking OSI layers to 3rd level of Internet working OSI that is
27 IP so as to enable starting downloading of the requested information
28 from one of said at least one participant servers and finishing the
29 downloading from another of said at least one participant server

1 without ever noticing server alteration by virtue of said at least
2 one participant server assigning to the requested information said
3 IP address of said main server and not said IP address of said at
4 least one participant server.

5 3. The system as defined in claim 2, wherein said top networking OSI is
6 at least one of TCP, HTTP, and application level.

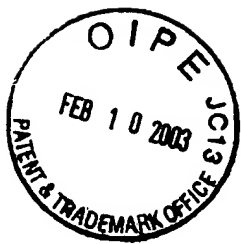
7 4. A method for using an Internet system, comprising the steps of:
8 a) making a request for information, over the Internet, by a
9 client, to a main server of the Internet system and not to
10 said at least one participant server;
11 b) examining an IP address of the client, by said main server;
12 c) seeking at least one participant server of the Internet
13 system, by said main server, so as to form an at least one
14 nearest participant server;
15 d) requesting over the Internet, by said main server acting like
16 an orchestra leader, that said at least one nearest
17 participant server send the requested information to the
18 client, packet-by-packet, over the Internet;
19 e) determining if said at least one nearest participant server
20 has the requested information;
21 f) labeling, by said at least one nearest participant server,
22 each packet with an IP address of said main server, which
23 enables the client which has a port open only for main server
24 addresses to accept said packets, if answer to step e) is yes;
25 g) sending the requested information with said IP address of said
26 main server, by said at least one nearest participant server,
27 to the client, over the Internet;
28 h) downloading the requested information from said main server to
29 said at least one nearest participant server, which will

1 distribute the load of said main server to said at least one
2 participant server when lacking multicasting so as to save
3 costs, by virtue of said at least one participant server being
4 relatively easy and inexpensive to add as compared to
5 clustering more servers to said main server, if answer to STEP
6 5 is no; and

7 i) returning to step f).

8 5. The method as defined in claim 4, wherein said step of making a
9 request for information, over the Internet, by the client, from the
10 main server includes making the request for at least one of a
11 streaming video and an audio, over the Internet, by the client, from
12 the main server.

13 6. The method as defined in claim 4, wherein said step of seeking the
14 nearest at least one participant server, by said main server, so as
15 to form an at least one nearest participant server includes seeking
16 the nearest at least one nearest participant server, by said main
17 server, so as to form said at least one nearest participant server
18 that has the most bandwidth and CPU and other serving requirements
19 needed to furnish the requested information to the client.



1 IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
2 BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

3 Applicant: Gorkam I. Ates

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Date: Feb. 10, 2003

17 MEMORANDUM OF LAW IN SUPPORT OF APPELLANT'S BRIEF

18 Appellant submits the instant Memorandum Of Law in triplicate in
19 support of its Brief on appeal.

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POINT II

IN ORDER FOR A REJECTION
UNDER 35 U.S.C. 102 TO
BE VALID EACH AND EVERY
LIMITATION MUST BE MET
BY A SINGLE REFERENCE

7 Anticipation under 102 requires identity of invention. The claimed
8 invention, including each element thereof as described in appropriately
9 construed claims, must have been disclosed in a single reference. To
10 anticipate a claim, a prior art reference must disclose every limitation
11 of the claim. Scripps Clinic & Research Found. v. Genentech Inc., 927
12 F.2d 1565, 1576, 18 USPQ.2d 1001, 1010 (Fed. Cir. 1991); In re Schreiber,
13 128 F.3d 1473, 44 USPQ.2d 1429 (Fed. Cir. 1997); Elmer v. ICC Fabricating,
14 67 F.3d 1571, USPQ.2d 1417 (Fed. Cir. 1995); Beachcombers, Int'l, Inc. v.
15 Wilde Wood Creative Prods., Inc., 31 F.3d 1154, 1160, 31 USPQ.2d 1653,
16 1658 (Fed. Cir. 1994); Standard Havens Prods., Inc. v. Gencor Indus.,
17 Inc., 953 F.2d 1360, 1369, 21 USPQ.2d 1321, 1328 (Fed. Cir. 1991);
18 Continental Can Co. USA, Inc. v. Monsanto Co., 948 F.2d 1264, 1267, 20
19 USPQ.2d 1746, 1748 (Fed. Cir. 1991); and In re Spada, 911 F.2d 705, 708,
20 15 USPQ.2d 1655, 1657 (Fed. Cir. 1990).

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POINT III

FOR A REFERENCE TO
DISCLOSE EACH AND EVERY
ELEMENT OF A CLAIM, IT
MUST DISCLOSE IT WITH
SUFFICIENT CLARITY TO
PROVE ITS EXISTENCE

28 For a prior art reference to anticipate a claim, the reference must
29 disclose each and every element of the claim with sufficient clarity to
30 prove its existence in the prior art. That presumed knowledge, however,
31 did not grant a license to read into the prior art reference teachings

1 that were not there. Motorola, Inc. v. Interdigital Technology
2 Corporation, 121 F.3d 1461, 43 USPQ.2d 1481 (Fed. Cir. 1997).

3 POINT IV

4 WHEN ISSUING A 102
5 REJECTION ALL OF THE
6 SAME ELEMENTS MUST BE
7 FOUND IN EXACTLY THE
8 SAME SITUATION AND
9 UNITED IN THE SAME WAY
10 TO PERFORM THE IDENTICAL
11 FUNCTION IN THE PRIOR
12 ART PATENT

13 Anticipation is strictly a technical defense. Unless all of the
14 same elements are found in exactly the same situation and united in the
15 same way to perform the identical function in a prior pleaded patent,
16 there is no anticipation. Stauffer v. Slenderella Systems of California,
17 254 F.2d 127, 128, 115 USPQ 347, 348-349 (9th Cir. 1957); National Lead
18 Company v. Western Lead Products Company, 324 F.2d 539, 544, 139 USPQ 324,
19 327-328 (9th Cir. 1963); and Kockum Industries, Inc. v. Salem Equipment,
20 Inc., et al., 175 USPQ 81 (Court of Appeals, Ninth Circuit 1972).

21 CONCLUSION

22 A claim cannot be rejected under 35 U.S.C. 102 if it depends from a
23 claim rejected under 35 U.S.C. 103 because in order for a rejection under
24 35 U.S.C. 102 to be valid each and every limitation must be met by a
25 single reference with sufficient clarity to prove their existence so that
26 all of the same elements are found in exactly the same situation and
27 united in the same way to perform the identical function.

28 Therefore, claim 2 cannot be rejected under 35 U.S.C. 102 because it
29 depends from claim 1 which is rejected under 35 U.S.C. 103, claim 3 cannot

1 be rejected under 35 U.S.C. 102 because it ultimately depends from claim
2 1 which is rejected under 37 CFR 103, and claims 5 and 6 cannot be
3 rejected under 35 U.S.C. 102 because they depend from claim 4 which is
4 rejected under 35 U.S.C. 103.

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